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Hugh J. Hatch and Ardean Hatch v. Stephen Adams, Sarah Adams and Earl Adams : Appellants' Petition for Rehearing, and Brief in Support Thereof

Utah Supreme Court

Ralph & Bushnell; Elwood A. Crandall; Attorneys for Appellants;

In the Supreme Court of the State of Utah

HUGH J. HATCH and ARDEAN HATCH,
Plaintiffs and Appellants,

vs.

STEPHEN ADAMS, SARAH ADAMS and EARL ADAMS,
Defendants and Respondents.

Case No. 8644

APPELLANTS' PETITION FOR REHEARING, AND BRIEF IN SUPPORT THEREOF

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APPELLANTS' PETITION FOR REHEARING

Appellants, Hugh J. Hatch and Ardean Hatch, petition the Court for a rehearing in this case upon the grounds hereinafter set forth.

In support of said Petition, appellants rely upon the following points:

POINT I

THE WORD "APPURTENANT" IS NOT SUFFICIENTLY CERTAIN IN MEANING THAT THE INTENT OF THE PARTIES CAN BE ASCERTAINED BY ITS USAGE, AND THEREFORE, THE COURT ERRED IN NOT REMANDING THE CASE FOR A NEW TRIAL AND DIRECTING THE TRIAL COURT TO ADMIT EVIDENCE TO DETERMINE WHAT WATER THE PARTIES INTENDED TO TRANSFER WHEN THEY USED THE TERM "APPURTENANT WATER" IN THE CONTRACT.

POINT II

THE TRIAL COURT DID NOT MAKE A DECISION OR FINDING BASED ON EXTRINSIC EVIDENCE AS TO THE INTENT OF THE PARTIES, AND IT WAS ERROR FOR THIS COURT TO INCLUDE SUCH EVIDENCE IN ITS DECISION AND TO PASS UPON THE QUESTION OF INTENT.

POINT III

THE DECISION OF THIS COURT INCORRECTLY UPHELD THE TRIAL COURT'S ASSUMPTION THAT THE QUESTION OF APPURTENANCY WAS THE SOLE ISSUE IN THE ACTION WHEREAS THE INTENT OF THE PARTIES SHOULD HAVE BEEN THE DETERMINING ISSUE.

WHEREFORE, appellants pray that their petition for rehearing be granted and that upon such rehearing, and after consideration of the record, and the law, the decision of the Court be recalled, and the case remanded to the trial court for trial.

RALPH & BUSHNELL
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Attorneys for Appellants

STATEMENT OF POINTS

POINT I

THE WORD "APPURTENANT" IS NOT SUFFICIENTLY CERTAIN IN MEANING THAT THE INTENT OF THE PARTIES CAN BE ASCERTAINED BY ITS USAGE, AND THEREFORE, THE COURT ERRED IN NOT REMANDING THE CASE FOR A NEW TRIAL AND DIRECTING THE TRIAL COURT TO ADMIT EVIDENCE TO DETERMINE WHAT WATER THE PARTIES INTENDED TO TRANSFER WHEN THEY USED THE TERM "APPURTENANT WATER" IN THE CONTRACT.

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ARGUMENT

POINT I

THE WORD "APPURTENANT" IS NOT SUFFICIENTLY CERTAIN IN MEANING THAT THE INTENT OF THE PARTIES CAN BE ASCERTAINED BY ITS USAGE, AND THEREFORE, THE COURT ERRED IN NOT REMANDING THE CASE FOR A NEW TRIAL AND DIRECTING THE TRIAL COURT TO ADMIT EVIDENCE TO DETERMINE WHAT WATER THE PARTIES INTENDED TO TRANSFER WHEN THEY USED THE TERM "APPURTENANT WATER" IN THE CONTRACT.

Inasmuch as the contract which transferred the farm land from the respondents to the appellants indicated that the land would be transferred with all water rights appurtenant thereto, and inasmuch as no further mention was made in the contract of the exact water that was considered by the parties to be appurtenant, the appellants attempted to introduce evidence in the trial to show what was meant by the terms (T-4, 5). This evidence was not introduced to vary the terms of the contract, but to explain them. Counsel for the respondents objected

to the introduction of the proffered evidence on the ground that it was within the parol evidence rule, and the trial court, in its minute entry, sustained the defendant's objection on the ground that the evidence violated the parol evidence rule and that the contract was not ambiguous (R. 31.) In so doing the trial court committed prejudical error, and this error was not recognized in the decisoin of this court. Such holdings are error for the reason that the evidence offered did not vary the instrument but rather explained it, and therefore was not in violation of the parol evidence rule.

The following is the universal rule:

> The parol evidence rule does not preclude the admission of parol or extrinsic evidence for the purpose of aiding in the interpretation or construction of a written instrument *where the language of the instrument itself, taken alone, is such that it does not clearly express the intention of the parties or the subject of the agreement.* Such evidence is admitted not to add or to detract from the writing but merely to ascertain what the meaning of the parties is . . . 32 C.J.S. Evidence Sec. 959. (Italics added.)

The word "appurtenant" is not certain in its meaning. Even the courts have applied interpretations to the word which vary from meaning only those *things indispensable to the use of land* (Ogden v. Jones, 37 S.W. 2nd 777) to simply those *things which serve some useful purpose to the land* (Nixon v. Western Union Telegraph Co., 14 Ohio App. 472). If the courts are undecided as to the exact meaning of the word, can it be expected that the true intent of laymen can be determined if the word alone is the only evidence of their intention?

The following quotation from McCormick on Evidence, Sec. 217, throws light on this somewhat hazy area of the law: (See authority cited thereafter in the treatise.)

> . . . written instruments are not self-sufficient and automatic mandates which the courts can always enforce merely by inspecting the instrument and stamping it with a judicial fiat. Written words can be translated into appropriate action by the court only through the process of ascertaining what the words stand for in the way of particular conduct or particular tangible objects. This process of interpretation is one which every human expression is subjected to wherever it is sought later to be used by human beings as a measure of conduct . . . this process is often unnoticed and frequently simple, but often again the meaning of the writing is a contested question between the parties, and evidence is adduced to solve the issue. The distinction between such interpretative evidence even where it consists of expressions of the parties to the instrument, and evidence of such expressions when offered to be used as a part of the contract, deed or other transaction, and hence prohibited by the Parol Evidence Rule, is clear. The one type of evidence concedes the supremacy of the writing and merely seeks to illuminate its meaning. *Evidence of the prior statements, negotiations, and agreements of the parties, offered strictly for the purpose of interpretation, may be excluded under (other) restrictions . . . , but such evidence is not within the prohibition of the Parol Evidence Rule.* (Italics added.)

The admission of parol evidence for the purpose of establishing what were the circumstances under which the contract was made, what was the relation of the parties, and what was their mutual knowledge, is not an infringement of the rule that parol evidence is inadmissible to contradict, add to, or

vary a contract in writing. Olsson v. Nelson, 248 Ala. 28 So. 2nd 186.

Where language of a contract is uncertain, extrinsic evidence as to circumstances which preceded and surrounded the execution of the contract is admissible and when such evidence has been received, the question of the meaning of the language used is one of fact. Silva v. Meyer, 276 P 2nd 174, see also Cordas v. Wright, 277 P 2nd 520.

The intention of the parties control in the construction of deeds. 16 Am. Jur. 527.

That the intention of the grantor governs in conveyances transferring appurtenant water is clear. In the case of James v. Barker et al, Colo., 1937, 64 P 2nd 598, where an almost identical fact situation existed, a deed purported to convey some water rights with the usual "together with all and singular the privileges and appurtenances thereunto belonging" clause, the court held:

> A water right used, as here, for the irrigation of land, will pass under the appurtenance clause in a conveyance of land, without a specific mention in the deed, if the presumptions arising from the circumstances of the transaction make it appear that it was the intention of the grantor that it should so pass.

In order to determine the circumstances of the transaction and the intention of the grantor, it is necessary to introduce evidence of the exact nature as that which the appellants attempted to introduce in the trial court. The decision of this court should remand the action for a new trial with instructions to admit extrinsic evidence as to the intent of the parties.

POINT II

THE TRIAL COURT DID NOT MAKE A DECISION OR FINDING BASED ON EXTRINSIC EVIDENCE AS TO THE INTENT OF THE PARTIES, AND IT WAS ERROR FOR THIS COURT TO INCLUDE SUCH EVIDENCE IN ITS DECISION AND TO PASS UPON THE QUESTION OF INTENT.

The trial court granted the defendants' motion to strike parol evidence offered to corroborate and explain the intent of the parties as shown by the contract. Inconsistently thereafter the court then proceeded to make Findings of Fact as to whether the water was appurtenant and the intent of the parties. In so doing, it relied upon extrinsic and parol evidence which it had purportedly stricken from the record. The Supreme Court in affirming the judgment of the trial court has made the same error. It has by implication upheld the ruling of the trial court in striking the parol evidence. Then it proceeds to examine the evidence in support of the trial court's determination and concludes "There can be no doubt that there is substantial evidence to support the trial court's findings." It is the position of the appellants that the lower court, having stricken the parol evidence, ruled as a matter of law that the water did not pass pursuant to the contract as being appurtenant to the land since the water rights were represented by stock certificates. Reliance thereafter by the trial court and by the Supreme Court on parol evidence introduced by the defendants, more particularly, the escrow agreement and the letter to Mr. Adams, cannot be consistently explained. All the plaintiffs request from this court is a ruling to the effect that parol and extrinsic evidence may

be received to determine the intent of the parties and that a new trial be granted, at which time all of such evidence will be considered by the trier of the facts.

The decision cited parol evidence in the favor of the respondents to indicate the intent of the parties when in the trial court, as the fact finder, lies the sole determination of the issue of intent.

The trial court did not make a finding as to the intent of the parties, and therefore, that issue is not before the appellate court. By affirming the trial court this court must adhere to the view that extrinsic evidence as to intent is inadmissible. It was improper therefore to assume the position and at the same time cite such evidence in the opinion.

It is true that such evidence as cited was admitted in the trial court without objection from the appellants, but the appellants, in order to remain consistent with their view of the law, could not object to such evidence and at the same time allege that all such extrinsic evidence was admissible to clarify the intent of the contracting parties. This dilemma should not be used against the appellants in derogation of their rights. It is submitted that the escrow agreement and the letter which were referred to in the decision should stand in the same light as evidence which the appellants attempted unsuccessfully to introduce. All such evidence should be placed before the trial court for a decision of fact, but no part of this type of evidence should be considered by either the trial or appellate court without considering all like evidence.

POINT III

THE DECISION OF THIS COURT INCORRECTLY UPHELD THE TRIAL COURT'S ASSUMPTION THAT THE QUESTION OF APPURTENANCY WAS THE SOLE ISSUE IN THE ACTION WHEREAS THE INTENT OF THE PARTIES SHOULD HAVE BEEN THE DETERMINING ISSUE.

According to the respondents the sole purpose of this action was to determine whether the water represented by the stock in question was appurtenant to the land which was sold under the contract. Quoting from their brief at page 2:

> It should be remembered that the case went to trial on this one issue only. This is not a case brought to reform a contract. Nor is it a case brought upon a theory of fraud or mistake in reducing the agreement to writing.

Though we agree that the issues were not couched in terms of reformation, fraud or mistake, we cannot agree that the sole question presented by the pleadings was the question of appurtenancy. Rather, the issue before the trial court was what effect should be given the contract of the parties. Paragraph 4 of the appellant's complaint reads as follows:

> 4. The Plaintiffs are entitled by the terms of the above mentioned contract to have transferred to them the water rights represented by said certificates.

Throughout this action, the appellants have based their rights on the contractual intent of the parties as evidenced by the written instrument and as clarified by extrinsic evidence.

In its decision this Court, in construing Brimm v. Cache Valley Banking Company, 2 U 2nd 93, 269 P 2nd 859, held that for water represented by stock to pass in a conveyance, it must be found first that the water was in fact appurtenant to the land, and second, that it was the intent of the grantor to transfer the water with the land.

The decision states: "There was substantial conflict in the evidence as to the extent and use of the water on this land." It is submitted that there was no conflict in the evidence in this regard. Rather, the water had been used in connection with this farm for almost one-half century. There was no contention by any parties but what the water was purchased with the farm by the respondents and used by them on the farm until the time of sale, and thereafter was used by the appellants for approximately two years before this dispute arose. The case was not tried on the question of whether the water was appurtenant but rather, whether it had been included in the contract.

We respectfully submit that water rights in the State of Utah are transferred almost daily by the passing of shares of stock when the water is not appurtenant to any land and in fact when a transfer of real estate is not part of the same exchange. In effect this decision of the court holds that, since the Brimm case, in order for there to be a valid transfer of water rights, the grantor must not only intend to transfer the water, but also the water must be appurtenant to the land. It is the view of the appellants that even if the water in question was not appurtenant it may be transferred if such was the intent of the parties.

In this case a specific mention of water rights was made in the contract. The Brimm case dealt with a situation where no mention of water was made in the deed. Where there is no mention of water rights in the document of transfer, in order for the water rights to pass with the land it is necessary to find that it is appurtenant. This doctrine is based upon the proposition that where water rights are so completely identified with certain property, they are deemed to be an incident of that property and will pass without specific mention in the deed. The Brimm case had one other requirement. In addition to being appurtenant, if the water rights are represented by stock certificates, then it must be shown that it was the intent of the parties that these rights should also pass with the land. So even under the Brimm case, the matter of intent was important and was emphasized by the court. Since the word "appurtenant" has no uniform technical meaning, it therefore becomes necessary to look at all of the evidence and the surrounding circumstances to determine the intent of the parties. In "In re Johnson's Estate," 64 Utah 114, 728 Pacific, the court stated:

> In such a case (where water rights are separated from the land) *if the water right is represented by shares of stock in a corporation, the plain implication is that it may be transferred by a transfer of the certificate of stock, in the ordinary manner, as personal property.* But that does not necessarily mean that water rights thus represented may not be an appurtenant to the land upon which the water is used, *and pass as such* with a conveyance of the land. (Italics added.)

It is the contention of the appellants that even if the water in question was not appurtenant in the strict sense of the word,

the appellants should be allowed their right to prove, if they can, that by using the word "appurtenant" it was the intent of the parties to the contract to include the water in question in the conveyance, and that upon establishing this the water would be transferred. The case should be remanded for a new trial for a determination of this issue which was not made by the trial court.

CONCLUSION

The Brimm case holds that where water rights are represented by stock certificates, a rebuttable presumption is created. The transferee, to rebut the presumption created by statute, may introduce evidence to show that the water was in fact appurtenant and that the parties intended that the water rights were to be included as an incident of the property. If extrinsic and parol evidence is not permitted, how then may the presumption be rebutted?

In this case the decision as written holds that where the transferee acquired the property pursuant to a contract, which stated "all water rights appurtenant thereto" may not introduce extrinsic or parol evidence to show what was meant by the word "appurtenant" or the intent of the parties. Such a holding places the transferee in a worse position by reason of having such a statement in the contract that he would have been if he had only received a deed of conveyance. To be consistent, parol and extrinsic evidence should be admissible to show that the water was in fact appurtenant and the intent of the parites in either case. The statement in the contract is merely evidence concerning the intent of the parties and should not

be used to prohibit introduction of evidence on the two issues mentioned above. For these reasons the case should be remanded to the trial court for a new trial to determine the rights of the parties after due consideration of all the facts surrounding the transaction.

Respectfully submitted,

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